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IN THE

# Supreme Court of Pennsylvania

EASTERN DISTRICT.

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January Term, 1957. No. 193.

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In the Matter of SELF DRIVE IT CORP.

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M. ALEXANDER FORMAN AND BETTY FORMAN,
*Appellants.*

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# RECORD

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APPEAL FROM THE ORDER AND JUDGMENT OF THE COURT OF COMMON PLEAS NO. 1, OF THE COUNTY OF PHILADELPHIA, AS OF SEPTEMBER TERM, 1956, NO. 4495.

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J. WEBSTER JONES,
500 Land Title Bldg.,
Philadelphia 10, Pa.,
*Attorney for Appellants.*

Martin & Lyle, 1103 Bankers Securities Bldg., Phila. 7, Pa.

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# Record

## RELEVANT DOCKET ENTRIES.

10-24-56. Order made appointing Irwin Apfel, Esq. and David Cohen, Esq., temporary Receivers. Bond to be filed in the amount of $50,000.00; see order, Kun, P. J. filed.

10-25-56. Bond filed. Aetna Insurance Co. Surety, Approved by Court.

10-30-56. Petition of Receivers for appointment of counsel, filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

10-30-56. Petition of Receivers for authority to continue payment plan of financing and leasing arrangements, filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

10-30-56. Petition of Receivers for leave to employ officer of Self Drive It Corp. filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

11-15-56. Report and Inventory and Appraisement of Temporary Receiver filed.

11-15-56. Exhibits to Report and Inventory and Appraisement of Temporary Receiver filed.

11-15-56. Order made and directed that a hearing be held on Nov. 21, 1956. 3 P. M. Room B 243 to determine whether a liquidating receiver should be appointed. Five days notice of said hearing be given to all shareholders of Self Drive Corp. See order Kun, P. J. filed.

11-15-56. Petition of Receiver for turn over filed.

*Relevant Docket Entries*

11-15-56. Order and decreed that M. Alexander Forman and Betty Forman are hereby restrained and enjoined from selling, transferring, or otherwise disposing any or all of the 100 shares of Common Capital Stock Self Drive Corp. etc., pending the determination of this petition and rule. Rule returnable Dec. 10, 1956 3 P. M. Room B 243. See order Kun, P. J. filed.

11-21-56. Exceptions of M. Alexander Forman and his wife Betty Forman to the report and inventory and appraisement of the Temporary Receivers filed.

11-28-56. Order made appointing Irwin Appel, Esq., liquidating receiver, the existing amount of security posted shall continue, see order Kun, P. J.

12-4-56. Sten. notes filed.

12-4-56. Petition of Liquidating Receiver for appointment of counsel filed.

Eo die. Petition granted and order made appointing Miller, Adelman and Lavine, Esqs., general counsel for Irwin Appel, Liquidating Receiver, see order filed.

12-4-56. Petition of Liquidating Receiver to sell assets in bulk at private sale filed.

12-5-56. Petition granted, see orders. Returnable Dec. 19, 1956 at 3 P. M. Room B 243 Kun, P. J. filed.

12-7-56. Answer to petition for turn over order filed.

*Relevant Docket Entries*

Eo die. Motion under Rule 25 (a) to quash, set aside and dismiss the above proceedings.

Eo die. Order for special appearance of J. Webster Jones, Esq., for M. Alexander Forman and Betty Forman filed.

Eo die. Exceptions to all orders and decree heretofore filed.

12-14-56. Motion to strike "Order for special appearance" filed.

12-18-56. Exceptions of M. A. Forman, et al., see order etc. dismissed. Opinion to be filed.

Eo die. Motion of M. A. Forman, et al. to quash etc. dismissed. Opinion to be filed.

12-19-56. Petition of M. A. Forman and Betty Forman his wife for a rule upon Richard S. Forman and Florence Forman to show cause why they should not accept an offer to pay them the sum of one-half of the net assets of the Self Drive It Corp. held by them filed.

Eo die. Rule refused, Kun, P. J.

12-19-56. Opinion, sur motion to quash proceedings and sur exceptions to order and decree, Kun, P. J. Concur Hagan, J., filed.

12-19-56. Certiorari from Supreme Court as of Jan. 1957 No. 193 brought into office and filed. Alexander Forman, Betty Forman Appellant.

12-28-56. Sten. notes filed.

1-3-57. Petition of Liquidating Receiver for authority to collateralize past due payments on security loan to Tradesmens Bank & Trust Co. filed.

Eo die. Petition granted see order Kun, P. J. filed.
1-3-57. Sten. notes filed.
1-8-57. Liquidating Receivers report and petition for confirmation of private sale in bulk of real estate and personality filed.
Eo die. Petition granted see order Kun, P. J. filed.
1-11-57. Affidavit under Supreme Court Rule 43 filed.
Eo die. Supplementary order confirming sale Kun, P. J. filed.
Eo die. Petition of Liquidating Receiver for authority is discharged security liens of First Nat'l Bank of Boston and Tradesmens Bank & Trust Co. filed.
Eo die. Petition granted see order Kun, P. J. filed.
1-14-57. Affd't assignment of bond filed.
Eo die. Sten. notes filed. If exception is deemed necessary to have an exception to the court's action, the exception is now entered for them.
1-15-57. Exception of M. Alexander Forman and Betty Forman to order of sale and confirmation of sale on Jan. 8, 1957, filed.
1-21-57. Receiver bond filed.
1-21-57. Petition for discontinuance proceedings and orders thereon, and application authorizing Liquidating Receiver to repay additional stock subscription monies filed.
1-30-57. Exceptions dismissed.
Eo die. Memorandum, Kun, P. J. and Hagan filed.

*Order of Court*

1-31-57. Order fixing hearing for Feb. 6, 1957 at 3:30 P. M. Room 248 and further ordered that 5 days notice of said hearing be given to all shareholders of Self Drive It Corp. See order, Kun, P. J. filed.

1-31-57. Petition of Liquidating Receiver to pay remaining obligation insured by temporary receiver and liquidating receiver during the operation of Self Drive It Corp. covering the period Oct. 25, 1956 to Jan. 8, 1957 filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

2-6-57. Petition to discontinue and terminate turn over proceedings and applications authorizing Liquidating Receiver to repay additional stock subscription granted. See order Kun, P. J.

2-25-57. Appeal taken to Supreme Court of Penna. on 12-19-56, No. 193, Jan. Term 1957 by M. Alexander Forman and Betty Forman.

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ORDER OF COURT.

AND NOW, to wit, this 24th day of October, 1956, upon consideration of the within Petition, it is ORDERED and DECREED:

1. That Irvin Apfel and David Cohen are hereby appointed temporary Receivers of all the assets, property, franchises, rights, privileges, of whatso-

ever kind of Self Drive It Corp. within the jurisdiction of this Court, with power to take, hold, demand, receive and collect all funds and assets belonging to said corporation.

Said Receivers are hereby empowered to operate the business of Self Drive It Corp. in such manner as may, in his judgment, be necessary and required for the preservation and protection of the assets of said corporation, and in so operating shall perform all the necessary and required actions in connection with the normal and general conduct of the business activities of Self Drive It Corp.

The said Receivers are hereby authorized to borrow such monies not in excess of seventy-five thousand ($75,000) dollars, subject to further order of this Court, as may be necessary and incidental in the conducting and operation of the affairs and business of Self Drive It Corp.

The said Receivers shall file an inventory and appraisement of the assets and property forthwith and shall, within thirty (30) days from the date of his appointment, make a full report to this Court.

The Receivers, in the conduct and operation of the business, shall employ such persons and make such payments and disbursements as may be necessary and incidental for said operation.

The Receivers are hereby given authority to operate the business of Self Drive It Corp. for a period of sixty (60) days, subject to further order of this Court.

That the Court shall, pursuant to order, fix a date

for hearing upon this Petition, and, at such time, upon the petition and facts and full hearing held thereon, make its determination upon the appointment of a permanent receiver for such purposes as the Court may thereupon determine.

The Court hereby fixes bond to be filed by the Receiver in the amount of Fifty thousand dollars ($50,000).

IT IS FURTHER ORDERED AND DECREED:

2. That Self Drive It Corp., its officers, directors and shareholders, agents and employees, shall forthwith turn over and deliver unto the Receiver, or his duly constituted agent or representative, all of the real and personal property of Self Drive It Corp., its assets and effects, as also all books of account, vouchers, deeds, leases, contracts, notes, accounts, monies, or other property belonging to Self Drive It Corp.

* * * * * * * * *

BY THE COURT,

KUN.
P. J.

*Petition of Shareholder for Appointment of a Receiver*

## PETITION OF SHAREHOLDER FOR APPOINTMENT OF A RECEIVER.

The Petition of RICHARD S. ROBINSON, respectfully represents:

1. That he is a shareholder of Self Drive It Corp., a Pennsylvania corporation.

2. That the petitioner, together with his wife, Florence H. Robinson, are the registered holders and owners of one hundred (100) shares of the common capital stock of Self Drive It Corp., representing fifty (50%) per cent of the total authorized and issued capital stock of said corporation; that the remaining fifty (50%) percent of the common capital stock of Self Drive It Corp. is held and owned by M. Alexander Forman and his wife, Betty Forman.

3. That the Directors of the corporation are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock; and that irreparable damage and injury is being suffered by the corporation, and such damage and injury will continue and be of such character and nature as to destroy the equity of the shareholders and may be injurious to the creditors.

4. That the actions of the officers, directors and shareholders in the instant matter are such as to pre-

vent the corporation from properly functioning, and are preventing the carrying out of normal operations by the corporation in that certain officers and management in control have refused and continue to refuse to carry out their respective duties, more particularly the signing of checks with which to pay employees, the payment of obligations to creditors generally, and the meeting of financing obligations due currently, all of which actions are of such character and nature as to threaten the corporation with financial collapse.

5. That there is immediate danger of misapplication of corporate funds.

6. That there have been acts of misapplication and the threat of continued such actions may be both embarrassing and destructive to the corporate affairs.

7. That in order to preserve the assets of the corporation for the benefit of all parties in interest, it is urgent and necessary that this Court immediately appoint a Receiver to take charge of the affairs of the corporation, to manage and operate same, and to properly and pursuant to the respective Court orders wind up and liquidate the assets of the corporation to the best interests of all parties.

WHEREFORE, your Petitioner prays your Honorable Court to grant the following relief:

*Petition of Shareholder for Appointment of a Receiver*

(a) That a Receiver be appointed for the corporation to take possession of all of its assets, books and records and to conduct the business and affairs of the corporation subject to further order by the Court.

(b) That the Receiver, if so ordered and directed and subject to full report of the Receiver, be authorized to liquidate the assets and wind up the business of the corporation in the nature of dissolution.

(c) That this Honorable Court grant such other and further relief as it may deem necessary.

RICHARD S. ROBINSON,
Petitioner.
ROBINSON, GREENBERG and LIPMAN,
MILLER, ADELMAN and LAVINE.

Jurat.

# REPORT AND INVENTORY AND APPRAISEMENT OF TEMPORARY RECEIVERS

(11a)

OCTOBER 25,

## A S S E T S

**CURRENT:**

| | | |
|---|---|---|
| Cash in Tradesmens Bank and Trust Co. | | $ 8,479.46 |
| Cash in Franklin National Bank | | 98.35 |
| Cash on Hand | | 925.00 |
| Accounts Receivable - Customers | 40,061.54 | |
| Less Reserve for Estimated Bad Debts | 19,433.92 | |
| | | 20,627.62 |
| Accounts Receivable - Employees, etc. | | 299.48 |
| Due from Forman and Robinson (an affiliated partnership) (current) | | 842.20 |

Automobile Rental Equipment:

| | Number of Units | Cost | Reserve for Depreciation | Carrying Value |
|---|---|---|---|---|
| Assigned (Contra) | 387 | 811,205.60 | 281,771.63 | 529,433.97 |
| Free (Unassigned) | 11 | 24,536.14 | 13,194.16 | 11,341.98 |
| | 398 | 835,741.74 | 294,965.79 | |
| Carrying Value | | | | 540,775.95 |

| | |
|---|---|
| Prepaid Expenses: Taxes, Insurance, License Tags and Deposits | 7,491.79 |

Due from Forman and Robinson (an affiliated partnership) (current) 842.20

Automobile Rental Equipment:

| | Number of Units | Cost | Reserve for Depreciation | Carrying Value |
|---|---|---|---|---|
| Assigned (Contra) | 387 | 811,205.60 | 281,771.63 | 529,433.97 |
| Free (Unassigned) | 11 | 24,536.14 | 13,194.16 | 11,341.98 |
| | 398 | 835,741.74 | 294,965.79 | |
| Carrying Value | | | | 540,775.95 |

Prepaid Expenses: Taxes, Insurance, License Tags and Deposits 7,491.79

| | |
|---|---|
| TOTAL CURRENT ASSETS | 579,539.85 |
| INVESTMENTS: (At Cost) Listed Securities (assign to Tradesmens Bank and Trust Co.) (Contra) | 592.61 |

**FIXED:**

| | Cost | Reserve for Depreciation | Carrying Value |
|---|---|---|---|
| Land and Building | $ 90,955.16 | $ 7,129.49 | $83,825.67 |
| Building Improvements | 28,022.74 | 5,261.08 | 22,761.66 |
| Furniture and Fixtures | 6,071.95 | 1,159.33 | 4,912.62 |
| Signs | 6,119.50 | 69.13 | 4,450.37 |
| Motorcycle | 500.00 | 347.22 | 152.78 |
| | $131,669.35 | $15,566.25 | |

| | |
|---|---|
| TOTAL FIXED ASSETS | 116,103.10 |
| TOTAL ASSETS | $696,235.56 |

(11a)

# L I A B I L I T I E S

(12a)

**CURRENT:**

| | | |
|---|---|---|
| Notes Payable - Tradesmens Bank and Trust Co. (Secured by assignment of 338 units) (Contra) | $376,981.80 | |
| Notes Payable - First National Bank of Boston (Secured by assignment of 49 units)(Contra) | 70,382.32 | |
| Notes Payable - Girard Trust Corn Exchange Bank (Secured by assignment of Boiler Costing $2,275.00) | 200.95 | |
| Accounts Payable (Dealers, etc. | 56,152.22 | |
| Loan Payable - Penn Auto Leasing Company | 4,000.00 | |
| Accrued Taxes - Payroll, Sales, etc. | 11,308.72 | |
| Reserve for State and Federal Income Taxes (1954-1955) | 4,067.59 | |
| Accrued Officers' Salaries | 18,200.00 | |
| TOTAL CURRENT LIABILITIES | | 541,293.60 |

**MORTGAGES PAYABLE:**

| | | |
|---|---|---|
| David H. Cohen | 4,072.53 | |
| Fidelity Mutual Life Insurance Company | 16,985.50 | |
| TOTAL MORTGAGES PAYABLE | | 21,058.03 |

| | | |
|---|---|---|
| Estimated State and Federal Income Taxes Payable (1955-1956) | | 15,742.93 |
| TOTAL LIABILITIES | | 578,094.56 |

**CAPITAL:**

**Capital Stock:**

| | | |
|---|---|---|
| Authorized (200 shares-Par Value $100.00) | 20,000.00 | |
| Less Unissued (180 shares) | 18,000.00 | |
| Outstanding Capital Stock (20 shares) | | 2,000.00 |


| | | |
|---|---|---|
| Estimated State and Federal Income Taxes Payable (1955-1956) | | 15,742.93 |
| TOTAL LIABILITIES | | 578,094.56 |

**CAPITAL:**

**Capital Stock:**

| | | |
|---|---|---|
| Authorized (200 shares-Par Value $100.00) | 20,000.00 | |
| Less Unissued (180 shares) | 18,000.00 | |
| Outstanding Capital Stock (20 shares) | | 2,000.00 |


| | | |
|---|---|---|
| Surplus (Page 3) | 116,141.00 | |
| TOTAL CAPITAL | | 118,141.00 |
| TOTAL LIABILITIES AND CAPITAL | | $696,235.56 |

| | |
|---|---|
| Balance of Surplus, December 1, 1955 | $ 92,397.66 |
| Add: Net Profit for the Period December 1, 1955 to October 25, 1956 (Page 4) (After Estimated Income Taxes) | 23,743.34 |
| Balance of Surplus, October 25, 1956 | $116,141.00 |

(12a)

*Hearing*
*Richard S. Robinson—Direct*

HEARING.

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Philadelphia, Pa., November 21, 1956.

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Before: HON. JOSEPH L. KUN, P. J.

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HEARING ON PETITION FOR APPOINTMENT OF LIQUIDATING RECEIVER.

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RICHARD S. ROBINSON, sworn.

BY MR. MILLER:

Q. Mr. Robinson, you are the Richard Robinson who signed the petition as shareholder for the appointment of a receiver in these original proceedings?

A. Yes, sir.

Q. What is your association with the Self-Drive It Corporation?

* * * (N. T. p. 2.)

THE WITNESS: I am the president of the corporation.

Q. It is a fact that you hold 49 per cent of the capital common stock of Self-Drive It Corp. and that your wife owns 1 per cent?

A. Yes, sir.

Q. So that between you and your wife you are 50 per cent stockholders?

A. Yes, sir.

Q. And M. Alexander Forman and Betty, his wife, are likewise 50 per cent stockholders?

A. Yes, sir.

Q. M. Alexander Forman holding 49 per cent and his wife, Betty, holding 1 per cent; is that correct?

A. Yes.

Q. Will you tell us what your duties are in connection with the operation of Self-Drive It Corporation?

MR. JONES: I am going to interpose an objection because the by-laws of the corporation state that and they are the best and only evidence and should be here.

THE COURT: He may state them. Why be so technical about these things?

* * * (N. T. p. 3.)

A. I handle the buying of the new cars and the

financing of the same and the selling of the used cars, the supervision of our salesmen on contracts, helping to set up the policies on our rates, daily or yearly, and duties similar to that.

Q. Including the handling of personnel, the hiring and discharging of employees?

A. I did usually.

Q. It is a fact, is it not, that you and your wife and Mr. Forman and his wife are the full directors of this corporation?

A. That is right, sir.

Q. Will you name the officers of the corporation?

A. Name the officers?

Q. Yes.

A. I am president and Mr. Forman is vice president and treasurer, or secretary-treasurer.

BY THE COURT:

Q. You and your wife and the other gentleman and his wife own equal interests?

A. Yes.

Q. Among you, you own the corporation?

A. Yes.

Q. Each of you with his wife owns 50 per cent?

A. Yes.

Q. So that neither one of you has control, in a sense?

A. That is right.

BY MR. MILLER:

Q. Mr. Robinson, in the original petition filed in this cause you allege that the directors of the corporation were deadlocked in the management of the corporate affairs?

A. Yes.

Q. And that the shareholders and management were unable to break this deadlock?

A. That is right. As a result, it looked like the corporation would suffer irreparable damage and injury.

Q. Will you explain to me how that came about?

BY THE COURT:

Q. Just explain to me how that deadlock arose and how this whole dispute arose.

A. Your Honor, we had a dispute in policy going back about a few months about whether or not we could reduce our fleet of cars. At that time it was my opinion and still is that if we reduced our cars and cut back on our financing program, the business could not exist successfully or even unsuccessfully; it might die by its own strangulation. Mr. Forman thought differently. That was the beginning of the problem. Then various other things happened. We got to a point where on a certain date Mr. Forman would not sign pay roll checks and our employees in the corporation went home without their pays. Although we had had a difference of opinion, it was

kept as secret as possible up to the moment when Mr. Forman refused to sign the pay roll checks, and then of course it was necessary that the employees know something, so I had to go to the help and tell them that since they were not getting their pay, I could not guarantee them work after this week because of the inability to pay them. That kind of demoralized them and brought the matter out in the open in the shop, and they didn't know who to take orders from. Finally on November 19th—I may be mistaken about the date; it was on Monday ——

BY THE COURT:

Q. That is just an approximate date?

A. Yes. Moneys were taken out of the cash box by Mr. Forman—they were not stolen; I am not alleging that, but they were taken out,—which confused our bookkeeping department, and eventually the men were paid from the moneys that he took out of the drawers.

On Tuesday we had a $29,000 and some odd dollars note to meet at the bank. We had the money in the bank and Mr. Forman at that time refused to sign the check. I went to him and explained that if he didn't sign the check, if we didn't get the check down to the Tradesmen's, we would be in default, which would be the worst possible thing that could happen to us, in my opinion, and he still refused to sign the check.

Q. Was that the incident that led to the filing of this petition?

A. Yes.

BY MR. MILLER:

Q. Were funds available to meet that check?

A. Yes, they were, Mr. Miller.

THE COURT: Well, that is a simple enough story.

BY MR. MILLER:

Q. Was there any serious conflict between you and your associate, Mr. Forman, with respect to financing arrangements that were conducted by the business?

THE COURT: You need not go any further, Mr. Miller. This, on the face of it, shows a conflict that requires the Court to act. That is all there is to it. It is as simple as it can be. You need not go further with your examination, but perhaps Mr. Jones wants to ask him some questions.

MR. JONES: Yes; I will be very glad to.

CROSS-EXAMINATION.

BY MR. JONES:

Q. Mr. Robinson, when was the last directors' meeting held?

A. The directors of Self-Drive It?

Q. Yes.

A. Frankly, I don't remember.

Q. To help you, I suggest to you that no directors' meeting was held or minutes posted since 1952. Is that so?

A. I really wouldn't know.

THE COURT: That does not bear on the question before the Court; not at all.

MR. JONES: Well, sir, if he were doing this as president, he certainly did it under some authority from the Board.

THE COURT: I don't care about that. It is a question of a status that has been created. I don't care whose fault it is. It is not a question of whose fault it is. It is a question of what the actual situation is, don't you see?

BY MR. JONES:

Q. Mr. Robinson, you told the Court that the check for $29,000 was not signed and delivered to

the bank on the day that you signed it. Do you want to modify that in any way?

A. Yes, I can modify it, Mr. Jones.

Q. Why don't you tell the Court what happened, Mr. Robinson?

A. All right, I will be very happy to do that. Your Honor, at the time that Mr. Forman would not sign the check—it was presented to him twice, once in our office on Monday evening by one of my employees,, and also on Tuesday in Mr. Jones' office. He refused each time. At the time my head bookkeeper called me in my office on 23rd Street and told me Mr. Forman wouldn't sign the check, I immediately called the Tradesmen's and asked Mr. Weber, the assistant vice president in charge of our account, and I informed him of the impasse that we had in our management, and I told nim that I could only give him a check to pay this note with one signature and would he accept that, since the deposit in our account at this bank was sufficient. I asked him would he so charge our account and he said he would. Then I made up a letter to Mr. Weber explaining the circumstances and explaining why I was sending down a check with only one signature. That was the only thing, so far as I was concerned, and I didn't get into it again untill a few days later. I found out then that Mr. Forman, when the bookkeeper was taking the check to the bank, saw the letter and check and signed the check, after I had called the bank and informed them of the controversy or the impasse that we were having in this corporation.

Q. Mr. Forman was the treasurer of the company, wasn't he?

A. That is true.

Q. And the moneys that you say he took were used to pay the men whose salaries were due?

A. Were taken for that reason?

Q. Yes.

A. I don't know.

Q. Well, they were paid from that money, were they not?

A. That is right.

Q. On the date on which you say Mr. Forman refused to sign the checks, is it not a fact that you presented to Mr. Forman a series of checks which did not include certain payments of salaries to him, yourself and others that were ordinarily made, and you demanded that he sign only a certain number of checks, and that no checks be signed for his salary during that week? Is that correct?

A. That is incorrect, sir.

Q. Did you agree to sign a check covering his salary and your salary that week?

A. Yes, I did.

Q. And did you sign it?

A. Yes, I did.

THE COURT: I don't see that that has anything to do with the controversy. It was his duty to sign the checks for the pay roll. The fact that they had a dispute among themselves did not justify him in refusing to sign the checks to pay the help. That was

quite irregular. The fact that they might have had problems between themselves as to whether one or the other is entitled to salary does not affect his primary duty to pay the help and keep the business going. They are two unrelated things.

* * * (N. T. p. 11.)

MR. JONES: I intend to contradict what has been said.

THE COURT: Mr. Jones, I will grant your request for a continuance for a week, but don't you see, it does not affect the situation at all. From what I have heard here, there must be a receivership. It is implicit in the whole situation. I don't care how many disputes there are. The more disputes there are, the more reason there is for the receivership. Go ahead with the examination now.

THE WITNESS: Mr. Jones, ——

* * * (N. T. p. 12.)

Q. Yes. Go ahead then.

A. Mr. Jones, you spoke to me about the salary of Mr. Forman and myself. I signed that check, Mr. Jones.

Q. On the day when you say he refused to sign it for the other parties?

A. That is right. Our salaries were included in that check.

* * * (N. T. pp. 13 and 14.)

Q. Mr. Robinson, isn't it correct that the only situation that exists at this time is that your corporation is not in a position to borrow more money? Is that correct?

A. That is not correct.

Q. Is it in a position to borrow more money?

A. No. You said is that the only thing that is wrong.

Q. All right. Your corporation needs additional funds to purchase cars for expansion; is that correct?

A. That is right. Pardon me. We don't need them for expansion. We need additional funds to continue the same operation we have today. This has only been partially successful. We don't have financing today to complete the cars that we have. We have a note due this Friday that we cannot meet for that reason.

* * * (N. T. pp. 15 and 16.)

RE-DIRECT EXAMINATION.

BY MR. MILLER:

Q. Mr. Robinson, will you state for the record whether or not the differences that have arisen and continued to exist between yourself and Mr. Forman are irreconcilable?

MR. JONES: I object to the question. It presupposes that there are differences.

THE COURT: I have heard testimony as to differences. It is a proper question. I have heard what he has testified to. He may answer it.

THE WITNESS: Mr. Miller, I would say, after a good many years of association with that company, that we should never be together again one minute more than is necessary.

---

MARIE ARRINGTON, sworn.

BY MR. MILLER:

Q. Miss Arrington, you are an employee of Self-Drive It Corporation?

A. Yes, I am.

Q. What services do you render to the corporation?

A. Bookkeeper.

Q. Are you familiar with the pay roll that was prepared on November 19th, that was referred to by Mr. Robinson?

A. October 19th, you mean?

Q. Yes, October 19th. Excuse me.

A. No, sir. I wasn't there that day.

Q. Do you know what that pay roll contained, you being the bookkeeper?

A. Yes, I do.

Q. You heard Mr. Robinson testify that that check

included the salaries to be paid out to himself and to Mr. M. Alexander Forman?

A. Both were included in the Self-Drive It Company pay roll, yes.

MR. JONES: Sir, I am objecting to this. The pay roll itself and the check should be before the Court.

THE COURT: Are they available? Apparently not.

* * * (N. T. pp. 17 and 18.)

Q. Well, you can produce it at the next hearing, because at the request of the attorney for the Exceptants, there will be another hearing.

BY MR. MILLER:

Q. Miss Arrington, you heard Mr. Robinson testify, with respect to the check that was issued the following month, I believe the 21st of November, to the Tradesmen's National Bank, it went to cover a monthly installment then due?

A. Yes.

Q. Did you handle the transaction, so far as obtaining signatures to that check?

A. Yes, I did.

* * * (N. T. pp. 18 and 19.)

Q. What, if anything, do you know about the signatures required on that check and the presentation of it by you at all to obtain those signatures?

A. I made out the check to the bank, which Mr. Robinson signed. Mr. Forman was not in at the time and I left word when I left the office for Mr. Forman to sign the check that was due at the bank at that time. So far as I know, that is when he stopped in that day, because I ran the check over with one of the employees. The next morning when I came in I was given the check back and told that Mr. Forman did not sign it.

Q. Well, do not tell us what you were told. You say the check was not signed?

A. Well, I was told it was not signed and then I was given the check back.

Q. Well, then you saw that it was not signed by Mr. Forman?

A. That is right. Do you want me to go on about the check?

Q. Well, that is all he has asked you, I think. Did you, yourself, have any talk with Mr. Forman about it?

A. Later that morning.

* * * (N. T. p. 20.)

Q. You may testify to that.

A. All right. When I got in in the morning I had a call from Mr. Forman to meet him at Mr. Jones' office with the pay roll envelopes, which I took with

me, and Mr. Robinson heard me talking to Mr. Forman on the phone and asked me if I would ask Mr. Forman again to sign the check, which I did. Mr. Forman looked at it and he said he was waiting for Mr. Jones to come in, but he didn't think he would sign it, and Mr. Robinson asked me, when I was leaving, if Mr. Forman did not sign it, to call him and let him know. Mr. Jones came in and Mr. Forman showed him the check and told him he wasn't going to sign it and he gave it back to me and I called Mr. Robinson and told him that he did not sign it, and at Mr. Jones' office I made up the payroll envelopes with the money that Mr. Forman had taken from the cash boxes and I took them back to the office with the check for the bank, and I gave everybody their pay, and Mr. Robinson gave me a letter to send to the bank with the check that he was sending to the bank. The check only had one signature on it since Mr. Forman wouldn't sign the check. However, Mr. Robinson had a conversation with the bank for them to take it out of the account. Mr. Forman came in later in the day. He saw the letter, he read it, and he apologized for causing extra work. He said he would sign the check, which he did sign, and I took it to the bank that afternoon.

CROSS-EXAMINATION.

BY MR. JONES:

Q. Was I in the office when you got there?
A. No, sir. You were not

Q. Do you know whether or not I knew that you and Mr. Forman were coming?

A. That I don't know.

Q. I see. The pay roll that you speak of was the pay roll for the preceding Friday, which had not been signed? Is that correct?

A. That is correct.

Q. And you obtained sufficient money from Mr. Forman and from petty cash to make up the pay roll for the preceding week; is that correct?

A. That is right.

Q. And then you took these various envelopes back to the plant and paid the men?

A. Yes.

Q. Mr. Forman advanced some of his personal funds in that circumstance, didn't he?

A. Yes, he did.

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RICHARD M. HENDERSON, sworn.

BY MR. MILLER:

Q. You are an employee of Self-Drive It Corporation, are you, Mr. Henderson?

A. Yes.

Q. What service do you render to Self-Drive It Corporation?

A. I am city manager for the Self-Drive It Corporation in charge of the 23rd Street office and in

charge of the rentals at the airport and so forth. We have an office in the motel at the airport.

Q. Who is your superior, or to whom do you account for your part of the operation of the business?

A. Mr. Robinson.

Q. You heard testimony today with respect to a certain pay roll check for the week of October 19, 1956. Did you have anything to do with that check personally?

A. No. The only thing I had to do with it personally was when Mr. Robinson came to me and told us we were not going to be paid because Mr. Forman would not sign the check. Mr. Forman, in front of everyone in the office, said that he wouldn't sign the pay roll check.

Q. Were there any words in your presence between Mr. Forman and Mr. Robinson on that occasion?

A. Well, it didn't seem that Mr. Robinson was upset, but Mr. Forman was very upset at the time he said he wouldn't sign it, and he wouldn't give us a reason for not signing it.

* * * (N. T. pp. 23 and 24.)

CROSS-EXAMINATION.

BY MR. JONES:

Q. Mr. Henderson, were you not asked to present the check for $29,000 to Mr. Forman?

A. I was.

Q. Did Mr. Forman make any statement to you as to why he would not sign that check?

A. No, he didn't.

Q. Did Mr. Forman not say to you that he would not sign this check until the pay roll checks were presented and signed?

A. No, he didn't.

Q. He made no statement of any kind along those lines?

A. No, he did not, sir. When I gave Mr. Forman the check for the $29,000, he said to me, "I am not signing any checks," and he gestured with his hands and that is all. He did not give me any reason at all for not signing the checks.

Q. He did not give you any reason at all for not signing the checks until the pay rolls were paid?

A. No, he did not, sir.

* * * (N. T. pp. 24 and 25.)

(Continued until November 28, 1956, at 3:00 o'clock P. M.)

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## ORDER OF COURT APPOINTING LIQUIDATING RECEIVER.

AND NOW, to wit, this 28th day of November, A. D. 1956, upon consideration of the shareholder's

petition for the appointment of a Receiver, pursuant to Sections 1107 and 1108 of the Business Corporation Act of 1933, as amended, and upon hearing held thereon and proof of the issues, and upon consideration of the report of the temporary Receivers, and the recommendations therein contained, and on motion of MILLER, ADELMAN & LAVINE, Esquires, attorneys for the temporary Receivers, IT IS HEREBY:

ORDERED, ADJUDGED, AND DECREED, as follows:

1. That Irwin Apfel, Esq., be, and he is hereby appointed liquidating Receiver of all of the assets, property, franchises, rights, privileges, whether real, personal or mixed, of whatever kind and description and wheresoever situate, of SELF DRIVE IT CORP., including but not limited to its lands, tenements, buildings, motor vehicles, plants, machinery, tools, outlets, merchandise, inventory, license agreements, lease agreements, shares of stock, bills and accounts receivables, cash on hand and in bank, contract rights and choses in action, income, profits, privileges, books of account, records, files, correspondence, and all other books, papers and accounts, deeds, and muniments of title.

2. That the said Receiver be, and he is hereby, authorized and empowered to:

(a) Demand, sue for, collect and take possession of all of the property, assets and effects above described or referred to wheresoever situate or found.

(b) Preserve the said property, assets and effects in the proper condition so that they may be advantageously and economically liquidated.

(c) Collect all amounts owing to said SELF DRIVE IT CORP. by shareholders on any unpaid portion of the consideration for the issuance of shares of stock.

(d) Employ such persons and make such payments and disbursements as in his discretion may be needful and proper in the preservation, protection, management and liquidation of the aforesaid property, assets and effects.

(e) Bring, commence, prosecute and defend at law or in equity, in his own name as Receiver of SELF DRIVE IT CORP., all suits and actions which, in his judgment, he deems appropriate or necessary for the preservation, management, protection, and liquidation of the aforesaid property, assets, and effects.

(f) Subject to the order of this Court, sell, convey and dispose of the aforesaid property, assets and effects of SELF DRIVE IT CORP. in bulk at private

sale, and, to this end, shall forthwith attempt to secure an offer, or offers, for the purchase thereof upon such terms as the Receiver shall determine and as shall be approved by the Court.

(g) Compound a settlement with a debtor of SELF DRIVE IT CORP., with persons having possession of property, belonging to SELF DRIVE IT CORP., or with persons in any way responsible at law, or in equity, to SELF DRIVE IT CORP., upon such terms and in such manner as Receiver shall deem just and beneficial to SELF DRIVE IT CORP.

(h) Perform all duties imposed upon him or required by law.

3. The existing amount of security posted by the Receiver shall continue until further order of the Court;

(a) The Officers, Directors, shareholders, agents, servants, and employees of SELF DRIVE IT CORP. be, and are hereby, restrained and enjoined from selling, transferring, concealing, disposing of, or in any manner interfering with any of the property of SELF DRIVE IT CORP., or from taking possession of, or in any way interfering with the possession or management of any of the property over which the Receiver is hereby appointed, or doing any act or thing to prevent the proper discharge by the Receiver of his duties under the Order of this Court.

(b) All of the creditors and shareholders of SELF DRIVE IT CORP. be, and they are hereby, enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity, or bankruptcy, or otherwise, against SELF DRIVE IT CORP., or foreclosing upon, selling, or in anywise disposing of any of the property held as security for loans made to the SELF DRIVE IT CORP. without leave of this Court, or the approval of the Receiver first had.

(c) The Receiver shall forthwith liquidate the property, assets, effects and affairs of SELF DRIVE IT CORP., and shall account to this Court with respect to same.

KUN,
J.

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HEARING.

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Philadelphia, Pa., November 28, 1956.

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Before: HON. JOSEPH L. KUN, P. J.

*Discussion*

THE COURT: This is a hearing, a continued hearing, is it not, on a petition to have a permanent receiver appointed?

MR. MILLER: Yes, sir.

MR. JONES: That is right. At the last hearing I made representation to the Court that I desired to file certain exceptions. Events after that—since then we have had two business days, Friday and Monday—events after that had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a permanent receiver and move on from that point, your Honor.

MR. MILLER: If it pleases your Honor, although the term "permanent receiver" is used, we speak of a "liquidating receiver" within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.

THE COURT: Oh, I see. That is the correct term, is it, "liquidating receiver", rather than "permanent receiver"?

MR. MILLER: That is right. Your Honor will note that in the original application filed there was no charge or suggestion of fraud, mismanagement or misappropriation of funds, but rather, the stockholders' petition, as filed, alleged a deadlock of the

directors and stockholders and am impasse existed. That is the basis for bringing this action, as provided for in the Business Corporation Act of 1933, sections 1107 and 1108 thereof, which further provides that upon final hearing, the Court shall thereupon appoint a liquidating receiver.

* * * (N. T., pp. 28 to 30, inclusive.)

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MOTION UNDER RULE 251 (c) TO QUASH, SET ASIDE, AND DISMISS THE ABOVE PROCEEDING.

AND NOW, to wit the 7th day of December, 1956, come M. Alexander Forman, Stockholder, Director, Secretary and Treasurer of the Self Drive It Corporation and Betty Forman Stockholder and Director of the Self Drive It Corporation, by their attorney, J. Webster Jones, Esq., and move the Court to quash, set aside and dismiss the above proceeding for the following reasons:

(1) The said petition was filed with the Court under the provisions of the Business Corporation Law of Pennsylvania (Act of May 5, 1933, P. L. 364, 15 P. S. 2852-1107 to 1112), the orders, decrees and actions of the Court were predicated upon the said petition; and the said Act, i. e. the Business Corporation Law of Pennsylvania, 15 P. S. 2852-1107 to 1112 are unconstitutional since the said Act violates the

Fourteenth Amendment of the Constitution of the United States providing inter alia:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

being U. S. Code Annotated, Constitution, Amendment Fourteen, Page 69.

(2) The Court in entertaining the said petition and granting all orders thereunder has acted upon an ex parte petition unsupported by any affidavits, which petition merely set forth conclusions in part in the words of the unconstitutional provisos of the Business Corporation Law.

(3) Since there is no proof in the entire record that the things set forth in the petitions heretofore filed exist as matter of fact.

(4) The Court erred in appointing temporary receivers.

(5) The Court erred in appointing a liquidating receiver.

(6) The Court erred in directing the receiver to sell at private sale.

(7) It is improper to order the receiver to sell at any sale other than a public sale after due hue and cry and public advertisement and notice to all persons and upon competitive bids.

(8) The Court erred in failing to judicially note and regard that all creditors are secured creditors; that the assets of the corporation exceed its liabilities by an amount in excess of $100,000.00; that there is no danger that the affairs of the corporation or its assets will be adversely affected; that a liquidating receiver is not necessary; that it is not to the best interests of the corporation and its share holders that its said assets be sold.

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## HEARING.

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Philadelphia, Pa., December 10, 1956.

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Before: HON. JOSEPH L. KUN, P. J.

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THE COURT: In the matter of Self Drive It Corp., I see that there are a number of items on my docket.

* * * (N. T., pp. 32 to 35, inclusive.)

MR. MILLER: My friend, Mr. Jones, now opens

the door to other matters that have suddenly appeared on the record. He has already offered a general appearance.

THE COURT: Yes.

MR. MILLER: And now he has filed an order for a special appearance. I am sure the Court will take cognizance of the fact that at the first hearing in this matter Mr. Jones entered, at your Honor's request, a general appearance and participated in the hearing on the merits of the original petition and application.

THE COURT: He certainly did at the last hearing on the application of the Petitioners for the appointment of a Liquidating Receiver, who I had described for a while as a permanent Receiver, but who, under the Statute, I think, is referred to as a Liquidating Receiver. Is that it?

MR. MILLER: That is right. And before the hearing started your Honor called on Mr. Jones as to whether or not he had filed his appearance, your Honor asked him whether or not he had filed his appearance, to which he said he did, and that was a general appearance in these proceedings.

THE COURT: He certainly did. There is no question about that, and he certainly participated in the hearing for all purposes. I have looked at the

notes of testimony and I find there a statement by Mr. Jones agreeing, in plain language, to this appointment. Therefore, it comes with bad grace for him to try to put in a special appearance now to try to question the proceedings. Have you seen the notes of testimony?

MR. JONES: No, sir.

THE COURT: Have you seen your statement?

MR. JONES: No, sir.

THE COURT: I suggest you read it.

MR. JONES: I recall the circumstances very clearly.

THE COURT: Don't recall anything. I suggest that you read it.

MR. JONES: When the Court used the words "permanent receiver", I went along. When you said "liquidating receiver", I withdrew and said I would not agree to the liquidating receiver.

THE COURT: The record will show what it shows.

MR. JONES: That is right; it will show what it shows.

THE COURT: It shows just what I told you and you have no standing whatsoever on that point. Furthermore, your attempt to enter a special appearance here will be absolutely useless. However, the other questions involved will be disposed of eventually, each in turn as required.

* * * (N. T., pp. 37 to 41, inclusive.)

MR. MILLER: Now there has been filed of record an attack against this entire proceeding, viz., a petition for a turnover order and exceptions ——

MR. JONES: I beg the Court's pardon. That matter is not before the Court on any phase of it.

MR. MILLER: I did not say it was before the Court.

THE COURT: What matters are you talking about?

MR. JONES: The matter of the petition and the exceptions that have been filed attacking the entire procedure.

THE COURT: They are before me. They are on the book, the docket here, for disposition, for hearing or argument on them, or whatever is to be done about it. Why say they are not before me.

MR. JONES: I don't know how they can be before you. They were not ordered there by me.

THE COURT: I ordered them down. I told the Clerk to put them on the same list so that I would have all these matters before me.

MR. JONES: I didn't know that. I didn't come prepared to proceed on that basis.

THE COURT: You will have to be prepared, because we have to get this out of the way before the 19th.

MR. JONES: All right, sir.

THE COURT: If you are not prepared to do it today, you may do it at some early date.

MR. JONES: This is the first knowledge that I have that the Court ordered them on the list.

THE COURT: Here they are. They had to be ordered down so that they could be disposed of.

MR. JONES: I know that somebody has to do it and it is usually for counsel to do it.

THE COURT: It has to be done before the return date on that other thing, you know.

MR. JONES: I understand.

THE COURT: Since you are not prepared to discuss these matters today, you indicate a time when you can do so. Today is the 10th. It has to be done with reasonable dispatch. In general, you are raising, I think, the question of the constitutionality of the Act fundamentally?

MR. JONES: That is right.

THE COURT: The whole Act?

MR. JONES: No, no. Pardon me.

THE COURT: No?

MR. JONES: I raise the question of a part of it and by special designation that part of it having to do with involuntary dissolution.

THE COURT: Whatever it is, you raised some question about the unconstitutionality of what you consider to be the applicable part of the Act?

MR. JONES: That is right.

THE COURT: We have to have argument on that and I would like to have it as soon as possible. In that connection you have to study this question: If the record shows, as it does, your agreement to the appointment of the Liquidating Trustee, Receiver,—if it does show that; I read it and that is the way I understand it; you read it the way you want,—the

legal question that I am now putting to you to study in connection with the other legal points that you are going to present to me is whether you can raise that question after such an agreement, if there was such an agreement. If you can, all right of course, and you may proceed further with it, or if you believe that you did not make such a statement, as I think you did, or if the record does not justify my statement, then of course you certainly can raise the question.

MR. JONES: Let me clarify my statement on that with you.

THE COURT: Will you please do that? Of course you cannot clarify anything that is on the record. What is there is there. It is indelibly there. You cannot change it and all I want to know now is a date when you want to submit argument to me.

* * * (N. T., 44 and 45.)

(Adjourned until Friday, December 14, 1956, at 3 o'clock P. M.)

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OPINION SUR MOTION TO QUASH PROCEEDINGS AND SUR EXCEPTIONS TO ORDERS AND DECREES.

KUN, P. J.

There is perhaps no case on record where motions, exceptions, etc. such as filed on behalf of M. Alex-

ander Forman, a principal shareholder, were filed with less justification than in this case, as will readily be seen from the following recital of the proceedings:

The above named Self Drive It Corp. is practically a two-man corporation, certain shares of stock having been issued in equal parts to Richard S. Robinson and to Forman, with one share to the wife of each for qualifying purposes. The stock being equally divided, neither side had control. The shares issued to Robinson and Forman were not fully paid for, and when the Liquidating Receiver was appointed, he called upon each of the parties to pay the balance due on the shares issued. Robinson paid up and Forman refused, whereupon the Receiver obtained a rule against Forman to show cause why he should not be directed to pay the balance due on the shares issued to him, some $9,000.00, or surrender the shares of stock held by him in that amount. Although, as stated, Robinson paid the sum of $9,000.00 in cash to the Receiver—the amount due on the shares issued to him—Forman filed an Answer to the Receiver's petition that the shares were to be paid for by services to be rendered by the parties to the corporation, although there was no such corporate action. Inasmuch as the corporation appears to be entirely solvent, and no rights of creditors are involved, this part of the proceedings has been continued by the Court for adjustment on eventual distribution.

The proceedings were instituted under Section

1107 and 1108 of the Pennsylvania Business Corporation Law of 1933, on the allegation to the effect that the persons named, being the only persons in interest, had come to a disagreement or deadlock in the management of the corporation which they were unable to resolve, and asked for the dissolution of the corporation. Temporary receivers were appointed, followed by a hearing as required by the statute, at which the parties in interest, their attorneys and witnesses were present and heard in open court. J. Webster Jones, Esquire, appeared with M. Alexander Forman, the other principal shareholder, and cross-examined the petitioning shareholder, Robinson. No contradictory testimony was offered because it appeared quite clearly from the testimony of Robinson and other witnesses called that an impasse had indeed been reached between Robinson and Forman, so much so that when a note of the corporation fell due, Forman refused to sign a renewal thereof for a while, and Robinson had to take care of the situation in the interim by his personal assurances to the bank which held the note. It was also disclosed at the hearing that Forman refused to sign and issue checks for the payroll of the corporation employees, who, however, were later paid by cash on hand. Under all the circumstances, the necessity for the petitioner's action begun under the statute was quite apparent. The corporation being solvent and no fraud being claimed, the only remedy petitioner had was under the statute *Bowman v. Gum Inc.*, 321 Pa. 516.

Since the parties had not resolved their differences in the meantime, the Court, in due course as required by the statute, on appropriate petition, allowed a Rule to Show Cause why a Liquidating Receiver should not be appointed. On the return date of this rule, J. Webster Jones, Esquire, again appeared for Forman and asked for a week's continuance, to consider further steps in the matter. This continuance was granted. At the continued hearing, when the case was called, Mr. Jones made the following statement to the Court:

> "MR. JONES: That is right. At the last hearing I made representation to the Court that I desired to file certain exceptions. Events after that—since then we have had two business days, Friday and Monday—events after that had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a permanent receiver and move on from that point, your Honor."

Counsel for the petitioner then drew the Court's attention to the fact that the correct designation of the appointment under the statute was "liquidating receiver". The Rule to Show Cause so stated. Whereupon, there being no objection to the appointment and, on the contrary, specific agreement thereto, the Order appointing the Liquidating Receiver was made. The record shows, immediately after Mr. Jones' statement, the following:

> "MR. MILLER: If it pleases your Honor, al-

though the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.

"THE COURT: Oh, I see. That is the correct term, is it, 'liquidating receiver', rather than 'permanent receiver'?"

Thereafter, the Liquidating Receiver asked leave to sell the assets of the corporation at a private sale in bulk, to the highest bidder. The statute specifically provides that the assets may be sold either in bulk or at private sale, whichever is more suitable to the nature of the business. In this case, we do not have a manufacturing company, or a merchandise company with assets on the ground. The business of the corporation is rendering service by renting out automobiles to persons at certain rates for self-driving, and the automobiles so rented out are scattered at various parts of the country, in process of use. It is apparent, therefore, that this is the kind of a business that can not very well be sold at public sale, piecemeal, but must be sold in bulk as a going concern. The Liquidating Receiver was therefore given the authority to contact persons or corporations all over the United States who might be interested in purchasing a business of this kind. The petitioner made an offer to the Liquidating Receiver which was recited in the petition and, of course, Forman, the other principal shareholder, and any other person has the same right to make an offer, and the

sale will be made to the highest bidder. The purpose of the proceeding is to get the highest possible price for the assets of the corporation, so that the best possible distribution can be made between the parties.

Each step in these proceedings has been taken in strict accordance with the Pennsylvania Business Corporation Law of 1933, and there is not the slightest merit in the blanket exceptions to the orders and decrees entered in this case, especially considering the agreement to the appointment of the Liquidating Receiver made in open court, as noted above. Likewise, there is no merit whatever in the motion made to quash, set aside and dismiss the proceedings. Such action on the part of a person who has agreed to such an appointment is perhaps without parallel in the records of this Court.

One additional point may be noted. After counsel for Forman appeared at the initial hearing, and thereafter at the hearing on the rule for the appointment of a liquidating receiver, and secured a continuance, and at the continued hearing agreed to the appointment of the Liquidating Receiver, he nevertheless filed a "special appearance". Such action is meaningless, because a special appearance is permissible only for the purpose of questioning the jurisdiction of the Court. In the matter before us, there is no basis whatever for filing such an appearance. The Court has complete jurisdiction of the subject matter and of the persons involved. Moreover, a special appearance to challenge the jurisdiction of

the Court cannot be filed after the party has appeared in court, represented by counsel who has taken part in the proceedings by examination of the witnesses, and especially in this case where he agreed in open court to the appointment of the Liquidating Receiver. While a motion has been filed to strike off this "special appearance", it is unnecessary to do so, having no significance as such. It is in legal effect a general appearance, by its own terms, despite its label, confirming the fact of general appearance on the part of Forman by representation by his counsel in the court proceedings in this case, which appearances appear of record.

The Exceptions are dismissed as is also the Motion to Quash, Set Aside and Dismiss the proceeding.

BY THE COURT:

/s/ KUN,

P. J.

December 19, 1956.

I concur.

/s/ HAGAN,

J.

*Hearing*
*Discussion*

HEARING.

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December 19, 1956.

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Before: HONORABLE JOSEPH L. KUN, P. J.

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THE COURT: The matter that we have before us now is the Self-Drive It Corporation matter.

I believe this is the return date of the order entered by the Court on a petition for leave to sell at private sale under the conditions therein mentioned, in which there was incorporated, I believe, an offer received by the Liquidating Receiver, as set forth in the petition.

Is that the matter before the Court today?

MR. MILLER: That is correct, sir.

May I make certain statements for the record?

THE COURT: Yes, certainly.

MR. MILLER: There has been filed with the Clerk's Office and duly docketed the following affidavits of service of notice of this hearing, to wit:

upon J. Webster Jones, Esq., attorney for Betty Forman and M. Alexander Forman, in which notice there was enclosed a copy of the petition and the order of this Court dated December 5, 1956, together with all of the exhibits which the Court has designated to be attached to such notification; an affidavit of service of notice of this hearing on all creditors and other parties in interest; and an affidavit filed by the Liquidating Receiver, to which has been attached copies of letters of invitation to bid, which has gone forth to the public and in which letter there is incorporated copies of the petition and the order of this Court with respect to the request of the Liquidating Receiver to sell at private sale in bulk all of the assets of Self Drive It Corporation; and a copy of the inventory and appraisement, dated October 25, 1956, filed of record; also, a copy of the license agreement referred to in the petition and order by and between the Avis Drive It Yourself Corporation, licensor, and Self Drive It Corporation, licensee.

I wish to state for those present and for the record a notification sent by J. Webster Jones, Esq., to Irwin Apfel, Liquidating Receiver, which Mr. Jones, for Betty and M. Alexander Forman, stockholders of Self Drive It Corporation, has in writing requested the Liquidating Receiver to announce at this time for the benefit of all prospective bidders that on behalf of his clients, Betty and M. Alexander Forman, he may take an appeal or appeals to a higher court or courts, attacking the proceedings upon which this sale is based.

THE COURT: I can supplement that by the fact that I have been informed by letter from Mr. Jones just before I came on the bench that he has taken such an appeal.

Yesterday Judge Hagan and I dismissed the exceptions and motion to vacate the proceedings heretofore taken in this matter, and this morning we filed an opinion stating our reasons for it. Since then Mr. Jones has taken an appeal from that, and he has so notified us.

MR. MILLER: May I call to Your Honor's attention that I believe the statutes of Pennsylvania with respect to appeals do not provide that the mere taking of an appeal shall act as a supersedeas until bond has been filed or supersedeas issued?

THE COURT: It certainly does not act as a supersedeas, and the Court will proceed with the matter as is required by the circumstances. Therefore, you may go ahead.

* * * (N. T., pp. 4 to 13, inclusive.)

MR. JONES: Now, sir, I would like very clearly on the record at this moment ——

THE COURT: Will you state your name, please?

MR. JONES: I am J. Webster Jones. I represent M. Alexander Forman and Betty Forman. Mr. For-

man is a director of the corporation. He is secretary and treasurer of the corporation—or was. He is a stockholder holding 99 shares, and his wife, Betty Forman, holds one share of the stock—being equal stockholders with Mr. Robinson.

I desire to place upon the record, so that it may formally appear at all times, that an appeal from the order of the Court dismissing our motion to quash and dismissing our exceptions was filed with the Supreme Court of Pennsylvania on this date and was lodged with the Prothonotary of this Court at approximately 2:35 on this date.

THE COURT: I think we made such an announcement.

MR. JONES: I want to make very clear that it is on the record, sir.

THE COURT: There is no doubt about it that it is on the record.

MR. JONES: And, sir, I move the Court —— By saying that that appeal has taken the matter from the jurisdiction of the Court as of the present moment and at the moment that the appeal was lodged with the Prothonotary, I move the Court that the Court vacate what has been done today, because the matter is not now in the jurisdiction of the Court.

However the Court may view that, I have one other application to make, sir. I ask a one-week

period of time within which to submit other bids, that are in the offing but I am not in a position to submit today. One of the matters has come up within the last half-hour.

THE COURT: Well, of course, I am very glad to do it, but you state a sort of contradictory position. I don't know whether you realize it or not. You first tell me that the matter is not before the Court because you appealed.

MR. JONES: That's right.

THE COURT: Next you want me to continue the matter for a week to give you an opportunity to submit some bids that are in the offing, as you say, that might improve the present bid.

MR. JONES: That's correct, sir.

THE COURT: I am perfectly willing to grant that application, because the purpose of the proceeding, as I take it, is to get the highest possible amount for the asset that is being sold. And, of course, if more can be obtained for it, it is a result devoutly to be desired, and I am inclined to grant that application.

* * * (N. T., pp. 15 to 32, inclusive.)

## OPINION SUR EXCEPTION FILED BY M. ALEXANDER AND BETTY FORMAN.

While counsel for the exceptants stated at the argument that he filed the exception on January 14, 1957 merely to "protect the record", and was not to be argued, since the exception was directed to the action of the Court confirming the sale of assets on January 8, 1957, which action it is claimed was without lawful authority because of the pendency of an appeal in the Supreme Court entered on December 19, 1956, it is deemed necessary to pass on the exception.

In the Opinion filed by us on December 19, 1956, dismissing exceptions theretofore filed by the same exceptants, at which time the motions to quash and to set aside the proceedings were also dismissed, it was pointed out how baseless the position of the exceptants was, having agreed in open court to the appointment of a liquidating receiver, who was appointed in the proceedings instituted under Sec. 1107 and 1108 of the Pennsylvania Business Corporation Law of 1933, and not a proceeding in equity, as erroneously assumed by the exceptants in filing their appeal in the Supreme Court. As we pointed out in that Opinion, it was ruled in *Bowman v. Gum*, 321 Pa. 516 that equity has no jurisdiction in a matter such as this and the proceeding must be taken under the Business Corporation Law.

We pointed out in that Opinion that on the return date for the appointment of a liquidating receiver,

November 21, 1956, the same exceptants appeared by counsel and asked for a continuance of the hearing which though opposed by other parties in interest was granted. The matter was continued until November 28, 1956. It was at this hearing that the exceptants b ycounsel agreed in open court to the appointment of a liquidating receiver (mistakenly referred to at one point as "permanent" receiver. which was promptly corrected), as pointed out in our Opinion of December 19, 1956. Following the appointment of the liquidating receiver, he filed a petition under the Act to sell the assets in bulk at private sale, because of the nature of the business, for the reasons stated therein, upon which an Order was made authorizing such sale under conditions set forth, returnable December 19, 1956. On that date the exceptants again appeared by counsel to advise that they had taken an appeal to the Supreme Court. but as the record was still before the Court, and no supersedeas had been granted and bond filed, as required by applicable statutes, it was obviously necessary to proceed with the matter as required by the Business Corporation Law, since certain restraining orders and turnover orders had been made, and creditors had been enjoined from prosecuting their claims pending liquidation. The exceptants by counsel asked for a continuance to enable them to submit a bid which application was granted against the strong opposition of the other parties in interest, including creditors. While counsel for the exceptants had asked for a week's continuance, we granted

a continuance of nine days, until December 28, 1956.

The matter was heard again on the postponed date, to wit, December 28, 1956, when for reasons stated in the record, the exceptants by the same counsel again participated in the proceedings by asking for a further continuance because of some alleged difficulty in contacting persons from whom the exceptants expected to secure funds to enable them to bid. Again against the strong objections of the other parties in interest, the Court postponed the matter until January 8, 1957, on counsel's absolute assurance he would request no further continuance of the matter, as he expected to be in a position to bid on the postponed date. This turned out to be true, because on the postponed and final date for the sale, January 8, 1957, the exceptants by their counsel presented a check for $25,000 to the Receiver, as required by the terms of the sale to qualify as bidders, and proceeded to actively engage in the bidding, running it up to something over $90,000 above the original bid, all of which appears in detail on the record. The first bid made by the exceptants through counsel was $600,000 which, through the bidding, was run up by the exceptants to $660,000, but when Allen Weinberg bid $665,000, Mr. Jones, attorney for the exceptants, stated: "I have no further bid, sir." However, counsel for the petitioner Robinson then made a bid of $666,000, which started Mr. Jones again for the exceptants by bidding $667,000. The exceptants, through Mr. Jones, ran up the bidding to $672,000, after which Allen Weinberg bid $673,000, where-

upon Mr. Jones for the exceptants again stated: "No further bidding". No further bidding was made by anyone, whereupon the sale was confirmed to Allen Weinberg in the sum of $673,000, in open court, without any exception or objection thereto from exceptants or any one else. The successful bidder then and there made an additional deposit as required by the terms of sale, in addition to the $25,000 qualifying deposit previously made by him. The qualifying deposits in the same amount made by the unsuccessful bidders (including exceptants) were returned to them.

After thus participating extensively in the proceedings, from the beginning as outlined in the Opinion of the Court heretofore filed on December 19, 1956, and thereafter as further recited herein, particularly in the bidding on January 8, 1957 and standing by without objection to the confirmation of the sale to the highest bidder, the exceptants nevertheless filed the exception now before the Court six days later, on January 14, 1957 which, to say the least under the circumstances mentioned, was a most extraordinary action on their part (unless, as stated by their counsel, it was merely done to "protect the record").

The mere fact that the exceptants had taken an appeal to the Supreme Court, and had a certiorari issued to this court, did not ipso facto act as a supersedeas and stay the proceedings here. The exceptants continued thereafter, as hereinbefore set forth, to actively participate in the proceedings. Such par-

ticipation, as recited, by the exceptants in the proceedings to final sale, the bidding in which they participated, and standing by without objection when the sale was confirmed to one who had outbid them, may be regarded as an abandonment of their appeal which was never perfected by a supersedeas and bond. However that may be, the mere fact of the appeal and certiorari did not have the effect of staying proceedings such as we have before us. So far as the certiorari filed in this case is concerned, we were advised by the Prothonotary that it is returnable the third Monday in April, 1957, and it is the practice of his office to prepare the record and make the return about a week before the return date. Even if the certiorari is considered effective when filed, a certiorari is not a supersedeas. No doubt the Supreme Court in circumstances requiring it could direct a certiorari "forthwith". This is done on appeals from preliminary or special injunctions, but such an appeal does not of itself act as a supersedeas even though the record is removed from the court below (12 P. S. 1101). And as to general injunctions or relief in the nature thereof, an appeal does not act as a supersedeas unless bond is entered, as provided in 12 P. S. 1142. Whatever the nature of the proceedings, there is no doubt that they may be superseded by an order either of this court or of the Supreme Court and the filing of a proper bond to pay the costs and any damages resulting from the taking of what might turn out to be a baseless appeal. No such steps were taken by the exceptants in this case.

Exceptants have cited the case of *Harwood v. Bruhn*, 313 Pa. 337, for the proposition that the filing of an appeal and certiorari ipso facto acts as a supersedeas. However, all that that case decided, as quoted from an earlier case at page 341, was that: "At common law a court of first instance is without jurisdiction to proceed with a cause after the record thereof has been removed to an appellate court. This rule still applies in the absence of a statute providing otherwise." The Supreme Court added, referring to the proceeding before it: "Here, there is no such statute". Indeed, there could not be. Involved there was the question of the striking off of a judgment entered on a bond by the court below. After the removal of the record on appeal, the lower court made absolute the defendant's rule against plaintiff, requiring him to enter security for costs. Both orders were reversed. The common law rule was applied because there was no statute to the contrary in the circumstances of that case, obviously not, in the situation there present, because the lower court had, as stated, stricken off plaintiff's judgment so that plaintiff could not proceed. On an appeal from that kind of an order, no question of a supersedeas could be involved, so far as plaintiff-appellant was concerned. In that situation there was no interest to protect against damages by the delay caused by the appeal, because by striking off the judgment, the court below effectively stopped plaintiff from proceeding. It was to correct this that plaintiff appealed, and in the meantime nothing could be done

against the defendant. Hence there was no room for the application of a supersedeas requiring any bond to be filed by the plaintiff. It was in that situation that the court held the taking of the appeal and service of the certiorari acted as an "implied supersedeas"; and prevented the lower court from entertaining a rule on the plaintiff to enter security for costs. Moreover, the plaintiff in that case had a judgment, which was another reason why he could not be required to file a bond for costs. The case has never been referred to since because obviously in the situation there present no special supersedeas or bond could on any possible theory be required of the plaintiff-appellant, as the other party, the defendant, could not be damaged by the delay incident to the appeal. There were no adverse interests to protect by bond. If, on the contrary, in that case the lower court had refused to strike off the judgment, or refused to open the judgment, or refused to stay execution (in a situation where the judgment was properly entered but not yet collectible), and it was the defendant who would have appealed, then it is clear that under applicable statutes the mere taking of an appeal by him would not have stayed the plaintiff's proceedings in the court below, but the defendant would have had to obtain a supersedeas and file a bond. *Geiger v. U. S. Fidelity and Guaranty Co.*, 121 Pa. Superior Ct. 555, in which at p. 559 the court said: "As no supersedeas was specially allowed by the court below or by the Supreme Court, it follows that the appeal taken did not act

as a supersedeas and the petition to stay the writ of fieri facias should have been refused." The applicable statute is sec. 12, Act of May 19, 1897, P. L. 67. It is interesting to note that the appellant in that case had actually filed a bond, but the court held that the appeal and the bond do not themselves act as a supersedeas which must be specially allowed by either the court below or the Supreme Court.

In *Shinn v. Stemler*, 159 Pa. Superior Ct. 129, which was an appeal by defendant from the order of the court making the rule absolute for citation for the possession of real estate, the court said at p. 130: "The question presented is whether that appeal nevertheless acted as a supersedeas. It did not. The Act of May 19, 1897, P. L. 67, as amended, 12 P. S. Par. 1133 et seq., rules appeals on the question of supersedeas; and a supersedeas operates only in favor of those who ask for and have done those things necessary to obtain it. *Drabant v. Cure*, 280 Pa. 181, 187, 124 A. 340; *Koenig v. Curran's restaurant & Baking Co., et al.*, 121 Pa. Superior Ct. 201, 205, 207, 183 A. 451."

That the mere fact of filing an appeal, even with bond, does not act as a supersedeas was again pointed out in a note to *Kogen v. Horowitz*, 169 Pa. Superior Ct. 349, at 351.

The appeal entered by the exceptants in this case and captioned according to their notice in the Supreme Court as No. 193, January Term, 1957—returnable the 3d Monday of April, 1957, is stated under the heading "Nature of Case" as "Receiver-

ship in Equity", as taken from "the order and judgment" of this court. We have previously pointed out the proceeding is not in equity. The appeal does not designate the "order or judgment" appealed from. We had made a number of orders but have entered no judgment. However, we made orders appointing a liquidating receiver (to which exceptants agreed in open court, as the record shows); orders directing the turnover of the assets of the corporation to the receiver; injunctions against creditors from proceeding with their claims, and enjoining officers and directors of the company from interfering with the management of the business; and enjoining the exceptants themselves from transferring their stock (which allegedly had not been fully paid for).

It is perfectly clear that the appeal from such orders does not act as a supersedeas, and to stay proceedings in this court a supersedeas must be obtained either from this court or from the Supreme Court, and is not effective without the entry of an adequate bond. 12 P. S. secs. 1101, 1138, 1140, 1149, 1152.

Indeed, Appeal Rule 67 of the Supreme Court itself regulates "Petitions for the allowance of * * * a supersedeas", which is the final answer to the contention of the exceptants that the filing of their appeal and certiorari acted as a supersedeas so that the court had no right to proceed. The contention is not only without the slightest merit but comes with bad grace from the exceptants, in view of the utmost

consideration given them throughout the proceedings, granting their every request for a continuance, and participating as they did actively in the proceedings throughout, including their bidding at the final sale, which was confirmed in open court in their presence without any objection from them or any one else.

Considering the nature of the exception filed, it is necessary for the court to dispose of it. Accordingly, the exception is dismissed.

If the exceptants deem it necessary to have an exception to the court's action, the exception is now entered for them.

BY THE COURT:

KUN,

P. J.

January 30, 1957.

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## FINAL ORDERS.

10-24-56. Order made appointing Irwin Apfel, Esq. and David Cohen, Esq., Temporary Receivers.

12-18-56. Motion of M. A. Forman, et al., to quash etc. dismissed.